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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CLIFFORD F. REY,

D073506

Plaintiff and Appellant,

v.

(Super. Ct. No. 37-2017-00029969-CU-NP-CTL)

MARGARET REY,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Clifford F. Rey, in pro. per., for Plaintiff and Appellant.

Anderson Reynard and William D. Carey for Defendant and Respondent.

I.

INTRODUCTION

Plaintiff Clifford F. Rey, appearing in propria persona in this court, appeals from the judgment of the trial court dismissing claims against his sister, Margaret Rey, arising

from Clifford's ¹ allegations that Margaret unduly influenced their mother, Ida Rey, to change the distribution of her assets in her trust and will in a manner that benefited Margaret, to the detriment of Ida's other children, including Clifford. The trial court sustained Margaret's demurrer to Clifford's complaint on res judicata grounds, concluding that Clifford was barred from bringing his claims against Margaret because he had previously agreed to dismiss, with prejudice, a probate action in which he raised other claims based on the same set of operative facts, and in which the court had granted him leave to amend to pursue the same claims that he asserts in this civil action.

On appeal, Clifford argues that his claims are exempt from the application of res judicata and that the probate petition that he dismissed with prejudice did not include the causes of action that he alleges in the complaint in this case—financial elder abuse and intentional interference with expected inheritance. Clifford also raises a number of issues that pertain to the merits of his claims against Margaret.

We conclude that the trial court correctly determined that Clifford's civil claims are barred by the doctrine of res judicata because his claims were either litigated in the prior probate proceeding or could have been litigated in that proceeding, which was brought to a final judgment as a result of Clifford's dismissal of the probate action with prejudice. We reach this result recognizing that there may be circumstances where the result of the application of res judicata may seem " 'harsh and unjust' "; however, a judgment is " 'binding and conclusive against collateral attack.' " (Beverly Hills Nat.

¹ For ease of discussion, we will refer to the parties by their first names.

Bank v. Glynn (1971) 16 Cal.App.3d 274, 286.) We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On April 8, 2016, Clifford, who was represented by counsel, filed a probate petition (No. 37-2016-00011452-PR-TR-CTL) seeking to have Margaret removed as trustee of Ida's trust and to invalidate amendments to the trust and the codicil to the will that benefited Margaret to the detriment of other beneficiaries. Clifford alleged that Margaret had exerted undue influence over Ida, and that Ida lacked sufficient mental capacity at the time she executed the amendments and codicil. Specifically, Clifford contended that Margaret had manipulated Ida into changing the distribution of her assets that would occur upon her death in a manner that favored Margaret over Ida's other children.

On June 2, 2017, more than a year after filing the probate petition, Clifford filed a "Motion for Leave to File First Amended Petition." According to statements made in the documentation supporting that motion in the intervening months, the parties participated in a settlement conference but had been unable to reach an agreement. The parties had also apparently participated in a mediation that had failed to result in a settlement. A trial readiness conference was set for June 5, 2017, but Clifford noted that he was not ready for trial and was seeking leave to amend the underlying petition. The proposed "First Amended Verified Petition" included a number of alterations from the original petition,

including the addition of causes of action for financial elder abuse and intentional interference with expected inheritance.

After a hearing on the matter on July 21, 2017, the trial court granted Clifford leave to amend his petition to include the new claims and set a new trial date.²

The following month, on July 31, 2017, Clifford filed with the court a document titled "Stipulation Re Dismissal with Prejudice." (Some capitalization omitted.) In that document, Clifford noted that the parties had agreed to "dismiss with prejudice" the action that was initiated by his filing of the probate petition. The parties sought to vacate the trial date and all other court dates. That same day, Clifford also filed a "Request for Dismissal," noting that he was dismissing the "Petition" "[w]ith prejudice."

On August 15, 2017, approximately two weeks after dismissing the petition in the probate action, Clifford filed a civil complaint against Margaret (No. 37-2017-00029969-CU-NP-CTL).³ In the civil complaint, Clifford asserted causes of action for financial elder abuse, intentional interference with expected inheritance, and inheritance forfeiture,

The court also denied Clifford's motion for an order authorizing the release of Ida's medical records.

In the action filed in probate, Clifford was represented by attorney Zachary J. Varanini, with the law firm "Hackard Law, a PLC." In the civil action, the complaint was signed by attorney David C. Jones, who was also with the law firm "Hackard Law, a PLC."

pursuant to Probate Code section 259,⁴ based on the same essential facts underlying his probate petition.

In the civil action, Margaret filed a notice of related case regarding case No. 37-2016-00011452-PR-TR-CTL. Margaret then demurred to the complaint, contending that the claims in the newly-filed civil case involved identical causes of action to claims that were brought or could have been brought in the probate action, which had been dismissed with prejudice.

After taking judicial notice of the documents filed in case No. 37-2016-00011452-PR-TR-CTL, the trial court sustained Margaret's demurrer without permitting Clifford leave to amend the pleading. The court concluded that "[t]he two proceedings involve[] identical causes of action based on the same primary right," and that because "[e]ach of the causes of action were either actually litigated in the Probate case, or could have been raised and litigated in the Probate case," res judicata operated as a bar to Clifford's civil action and required that Margaret's demurrer to the complaint be sustained, without leave to amend.

The court entered a judgment dismissing the case on April 12, 2018. Clifford appeals from the judgment.

Clifford's claim made pursuant to Probate Code section 259 is premised upon his contention that Margaret committed financial elder abuse with respect to Ida. It is, in effect, a separate form of relief that may be requested with respect to a cause of action for elder abuse.

DISCUSSION

A. Standard of review from the sustaining of a demurrer

Because a demurrer tests the legal sufficiency of the complaint, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action: "In reviewing an order sustaining a demurrer, we assume well-pleaded factual allegations to be true and examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action on any legal theory. [Citation.]" (*Kyablue v. Watkins* (2012) 210 Cal.App.4th 1288, 1292.)

When a demurrer is sustained without leave to amend, we must determine whether the trial court abused its discretion in doing so. "It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment." (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854.) The burden falls on the plaintiff, however, to "show what facts he or she could plead to cure the existing defects in the complaint." (*Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 853–854 (*Boyd*).)

B. Clifford's claims in the current action are barred by principles of res judicata

The Supreme Court has used the term "res judicata" to encompass both claim preclusion and issue preclusion—primary and secondary aspects of res judicata—but has recently endorsed the use of the terms " 'res judicata' " to refer to claim preclusion, and " 'collateral estoppel' " to refer to issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).) We focus on res judicata, or claim

preclusion, which is the theory that Margaret advanced in the trial court and raises on appeal, and the theory on which the trial court relied in sustaining the demurrer.

"Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings, supra*, 61 Cal.4th at p. 824, italics omitted.)

"[R]es judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 (*Mycogen Corp.*), italics omitted.)

"Under the doctrine of res judicata, 'all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.' [Citation.]" (*Estate of Dito* (2011) 198 Cal.App.4th 791, 801; *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*).) "'"Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."'" (*Mycogen Corp., supra,* 28 Cal.4th at p. 897, quoting *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.) Importantly, res judicata bars the litigation of issues that were actually litigated in the prior proceeding, as well as issues that could have been litigated in the prior proceeding. (*In re Prather* (2010) 50 Cal.4th 238, 260 (*Prather*).)

The voluntary dismissal of a cause of action with prejudice constitutes a final judgment for purposes of res judicata. (*Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1527.) "'"A dismissal with prejudice is the modern name for a common law retraxit. [Citation.] . . . Dismissal with prejudice is determinative of the issues in the action and precludes the dismissing party from litigating those issues again." ' [Citation.]" (*Ibid.*)

Clifford dismissed his claims against Margaret in the probate action *with prejudice*. It is thus clear that for purposes of claim preclusion, Clifford's dismissal constituted a determination of those claims, as well as of any other claims that Clifford could have brought in the probate action, on the merits.

Clifford argues that the probate petition that he dismissed with prejudice did not include causes of action for financial elder abuse or intentional interference with expected inheritance.⁵ Clifford asserts that res judicata therefore cannot be a bar to his civil action asserting those claims.

It is true that at the time Clifford dismissed the probate action, he had not yet filed an amended probate petition that included causes of action for financial elder abuse and intentional interference with expected inheritance. Rather, Clifford filed a proposed amended petition that included those causes of action and sought leave of court to be permitted to amend the petition to include those claims. The court granted Clifford leave to file the amended petition as requested, but because Clifford had not included the words

Included in Clifford's claim for financial elder abuse is his corresponding request for relief pursuant to Probate Code section 259.

"First Amended" in the caption of the proposed pleading, the court gave him four days within which to file and serve a first amended petition. Rather than file a corrected first amended petition, however, the next document that Clifford filed was a document titled "Stipulation Re Dismissal with Prejudice" (some capitalization omitted). The probate action was thereafter dismissed with prejudice, without Clifford having filed or served the first amended petition.

The fact that Clifford never formally filed a probate petition that included his claims for financial elder abuse or intentional interference with expected inheritance does not mean that res judicata does not apply to bar his attempt to bring those claims now, in a separate civil action. Rather, "[i]t is black letter law that '[r]es judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding.' [Citation.]" (Prather, supra, 50 Cal.4th at p. 260; *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 446 ["prior final judgment on the merits not only settles issues that were actually litigated but also every issue that might have been raised and litigated in the first action" (italics added)].) Thus, Clifford's dismissal with prejudice of his probate petition not only bars the claims that he raised in the probate action, but also bars any claims that he *could have brought* in the probate action. (See, e.g., Greenspan v. LADT LLC (2010) 191 Cal. App. 4th 486, 514; Villacres v. ABM Industries Inc. (2010) 189 Cal. App. 4th 562, 576; Allied Fire Protection v. Diede Construction, Inc. (2005) 127 Cal. App. 4th 150.) "' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the

same cause of action on a different legal theory or for different relief." '[Citation.]" (*Mycogen*, *supra*, 28 Cal.4th at p. 897.)

Clifford could have brought his claims of elder abuse and intentional interference with inheritance as part of his probate petition; in fact, Clifford admitted that he made a strategic *choice* to dismiss the probate petition and to instead attempt to pursue remedies in a civil action. Indeed, the trial court specifically granted Clifford permission to assert those very claims in the probate action when the court granted Clifford's request for leave to file a proposed amended petition that would have included claims for both financial elder abuse and intentional interference with expected inheritance. It is thus clear that these causes of action, as alleged in the second-filed civil complaint, could have been litigated in the probate action. Rather than pursue those claims in the probate action, however, Clifford chose to dismiss that action with prejudice. The decision to dismiss an action with prejudice has significant consequences, not the least of which is that the claims raised in the action as well as those claims that could have been raised, cannot be revived in a later action. Clifford may not, therefore, assert those claims in a subsequent action.

Further, it is clear that the dismissal of the probate petition with prejudice bars any claims that Clifford might attempt to raise under alternative theories of recovery, if those claims are based on the same primary rights on which Clifford relied in the probate petition. "To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.' [Citation.] Under this theory, '[a] cause of action . . . arises out of an

antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term " ' [Citation.]" (*Boeken, supra,* 48 Cal.4th at p. 797.)

"In California the phrase "cause of action" is often used indiscriminately . . . to mean counts which state [according to different legal theories] the same cause of action' [Citation.] But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.]" (Boeken, supra, 48 Cal.4th at p. 798, italics added.) " '[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief." [Citations.] Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Ibid.*, italics omitted.)

In both the probate action and the civil action, Clifford sought compensation for the same essential harm. The gravamen of both actions is that Margaret manipulated Ida into changing the distribution of her assets in her trust and her will upon her death, thereby harming Clifford by reducing the portion of those assets that he would receive. In fact, Clifford's civil complaint sets forth the same set of operative facts and alleges the same basic injury that he alleged in the probate action. It is clear that the probate action and the later-filed civil action involve the same parties and seek compensation for the same harm. As a result, both actions "involve the same primary right" for purposes of the application of res judicata. (*Boeken, supra*, 48 Cal.4th at p. 804.) Res judicata thus bars the relitigation of Clifford's claims against Margaret in the underlying lawsuit at issue here.

To the extent that Clifford suggests that res judicata should not apply to his claim of financial elder abuse because, he contends, he could not have brought that claim in the probate action since the probate court did not have jurisdiction to consider it, we disagree. Probate Code section 800 provides generally that "[t]he court in proceedings under this code is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure." (Italics added.) "[S]ince the adoption of the California Constitution in 1879 there has been no 'probate' court in the sense of a court separate and distinct from the superior court. The term 'probate court' is but a convenient way of expressing the concept of a superior court sitting in exercise of its probate jurisdiction. This is but a colloquial expression such as it is used in referring to the domestic relations court, family court, or traffic court. Such expressions as these do not give courts performing these specific functions official status as a separate court.

[Citation.] 'Probate jurisdiction is in the superior court, and the probate court is a department of the superior court exercising such jurisdiction.' [Citation.]" (Copley v. Copley (1978) 80 Cal.App.3d 97, 107.) Further, Probate Code section 855 specifically provides that "[a]n action brought under this part may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part." (Italics added.)

Clifford's claim for financial elder abuse was intimately tied to his contentions in the original probate petition that Ida's amendments to her trust and the codicil to her will should be invalidated, given Margaret's alleged undue influence and Ida's alleged lack of testamentary capacity, and his assertion that Margaret should be removed as trustee because of the undue influence that she is alleged to have exerted on Ida. The financial elder abuse claims were clearly factually related to the subject matter of Clifford's probate petition. Further, the probate court in this case clearly understood that it had jurisdiction to hear and consider Clifford's elder abuse claim, given that it *granted* Clifford's request to amend the probate petition to allege a claim for financial elder abuse. We conclude that the trial court had jurisdiction to consider the financial elder abuse claim in the probate action.

Finally, the trial court did not abuse its discretion in denying Clifford an opportunity to amend his complaint. On appeal, Clifford has failed to demonstrate how he could cure the defects in his complaint, choosing instead to argue only that res judicata does not bar the claims that he raises in this action. (See *Boyd*, *supra*, 18 Cal.App.5th at pp. 853–854 [a plaintiff has the burden to show how he could amend the pleadings to

cure the defects in the complaint].) There is thus no basis for reversing the judgment of the trial court.

C. Clifford's request for judicial notice

After full briefing in this appeal was complete, Clifford filed a request for judicial notice, asking this court to take judicial notice of six items of evidence, including (1) a document that Clifford refers to as a "criminal case transcript, People of the State of California v. Margaret Ruth Rey, in San Diego County Superior Court, Case No. S258036 dated October 21, 2012"; 6 (2) documents that Clifford refers to as "the transcript of a disciplinary proceeding entitled 'In the Matter of Accusation Against Margaret Ruth Rey, aka Margaret Rey, 'Case No. 2013-595, dated February 14, 2014 under the authority of the California Business and Professions Code, Article 3, before the Board of Registered Nursing, Department of Consumer Affairs"; (3) a document titled "Second Amendment to the Ida v. Rey Trust of 2002 Trust Agreement Dated November 5, 2002" (some capitalization omitted), executed on February 10, 2015; (4) a document titled "Codicil to Will of Ida V. Rey" (some capitalization omitted); (5) a document titled "Second Amendment to the Ida V. Rey Trust of 2002 Trust Agreement Dated November 5, 2002" (some capitalization omitted), executed on December 27, 2015; and (6) a document that appears to be a letter from "Elaine M. Balok" to Clifford notifying him of Ida's death and the fact that he is a beneficiary of Ida's trust.

The document is a single page that provides virtually no information other than the provision of a case number, the date the case was filed, and Margaret's name.

It is clear that the evidence that Clifford attempts to put forth through his request for judicial notice pertains to the merits of his claims. However, as we have concluded, res judicata bars Clifford from pursuing the merits of these claims in this action. Because we find the materials in Clifford's request for judicial notice to be irrelevant to the issues on appeal, we deny his request. (See *Center for Biological Diversity v. Department of Conservation* (2018) 26 Cal.App.5th 161, 170, fn. 15 [denying as irrelevant requests for judicial notice].)

IV.

DISPOSITION

The judgment of the trial court is affirmed. The respondent is entitled to costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.